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APR 13 1994

Before the  
MAIL BRANCH FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Computer III Remand Proceeding	)	CC Docket No. 90-623
	)	
Application of Open Network	)	CC Docket No. 92-256
Architecture and Nondiscrimination	)	
Safeguards to GTE Corporation	)	

**COMMENTS OF THE  
AMERICAN PUBLIC COMMUNICATIONS COUNCIL**

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AMERICAN PUBLIC COMMUNICATIONS COUNCIL**

The American Public Communications Council ("APCC") submits the following comments in response to the Commission's Public Notice seeking additional comments on rules governing telephone companies' use of customer proprietary network information ("CPNI"), FCC 94-63, released March 10, 1994. The Commission requests comments as to "whether any changes in [the Commission's] rules are required to achieve the best balance between customer's privacy interests, competitive equity, and efficiency", Public Notice, supra, at 1. APCC's comments focus specifically on the need for safeguards to protect the CPNI of independent public payphone ("IPP") providers from unauthorized access by local exchange carrier ("LEC") personnel who market public payphones.

**STATEMENT OF INTEREST**

APCC is a trade association made up of more than 280 competitive providers of non-telephone company, independent public payphones ("IPPs") and other communications facilities. APCC seeks to promote competitive markets and high standards of service for IPPs and for public communications generally. IPP providers directly compete with LECs in the public communications

marketplace, but are denied protection of the CPNI safeguards that are applicable to providers of enhanced services and customer premises equipment ("CPE").

#### SUMMARY

IPP providers are entitled to the protection of the Commission's rules regulating competitive access to CPNI. The Commission has consistently required the BOCs and GTE to maintain nondiscriminatory policies in the provision and maintenance of network functions supporting unregulated products and services. In both the provision of CPE and enhanced services, the Commission has recognized the importance of ensuring that LECs do not gain an unwarranted competitive advantage from access to CPNI on the same terms and conditions not available to their competitors. However, the Commission has yet to take any steps to protect the payphone market from the same kind of anti-competitive behavior that is forbidden in the CPE and enhanced services marketplace. Under the current regulatory scheme, LECs are not even subject to a rule requiring them to respect the request of a payphone owner that the LEC's payphone marketing personnel be denied access to CPNI. At the same time, IPP providers have no right to access comparable information regarding payphones operated by its competitors. Allowing the LECs' public payphone marketing personnel unfettered access to CPNI is contrary to the Commission's established policies governing carrier provision of competitive products and services.

The Commission should extend the CPNI safeguards accorded independent providers of enhanced services and CPE to IPP

providers. At a minimum, the Commission should extend to IPP providers the basic protection of ensuring that, where an IPP provider has affirmatively objected to disclosure of CPNI, the LEC is prohibited from disclosing CPNI to its payphone marketing personnel.

#### BACKGROUND

CPNI is information about a customer's use of network services that a telephone company possesses because the company provides those network services. Unequal access to CPNI gives LECs an unwarranted advantage over IPP providers in the marketing of payphones.<sup>1</sup>

The development of competition in the public payphone marketplace is largely a result of the Commission's Coin Telephone Registration Order.<sup>2</sup> In that order, the Commission authorized interconnection of IPPs with the network on the same basis as other CPE. However, the Commission declined to apply its Computer II policies to carrier-provided payphones.<sup>3</sup> In 1988, the Public Telephone Council filed a petition for a declaratory ruling that BOC public payphones are CPE and thus should be provided on an

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<sup>1</sup> In the payphone context, the payphone provider is usually the "customer" of the LEC. Thus, the CPNI of a payphone owner is similar to that of a provider of enhanced services.

<sup>2</sup> Registration of Coin Operated Telephones Under Part 68 of the Commission's Rules and Regulations, 57 RR 2d 133 (1984), recon., FCC 85-16 (Jan. 22, 1985).

<sup>3</sup> Petition for Declaratory Ruling of Tonka Tools, Inc. and Southern Merchandise Corp., 58 RR 2d 903 (1985).

unbundled basis.<sup>4</sup> APCC participated fully in that proceeding, submitting initial and reply comments to the petition. To this date, almost six years after having accepted the petition, the Commission has not ruled on its merits.

By failing to rule on the PTC petition, the Commission has deprived the payphone marketplace of the benefits of the Computer II and Computer III policies designed to equalize the terms of competition between the products and services of LECs and independent providers. Among the beneficial policies from which IPP providers have been excluded is the Commission's policy regulating access to CPNI by LECs and their competitors. Since the initial Computer II ruling,<sup>5</sup> the Commission has recognized that discriminatory access to CPNI gives LECs a significant competitive advantage over their competitors. Initially, the Commission determined that CPE and enhanced services, when provided by the BOCs, should be provided through a separate subsidiary.<sup>6</sup> The Commission adopted a rule prohibiting the BOCs from providing CPNI to their CPE and enhanced services subsidiaries unless that

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<sup>4</sup> Expedited Petition for Declaratory Ruling of the Public Telephone Council, In the Matter of The Public Telephone Council Petition for Declaratory Ruling that Bell Operating Company Pay Telephones Are Customer Premises Equipment for regulatory Purposes (filed July 18, 1988).

<sup>5</sup> Amendment of Section 64.702 of the Commission's Rules and Regulations, ("Second Computer Inquiry"), Final Decision, 77 FCC 2d 384 ("Computer II Final Decision"), recon., 84 FCC 2d 50 (1980) ("Computer II Reconsideration"), further recon., 88 FCC 2d 512 (1981), aff'd sub nom. Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983), second further recon., FCC 84-190 (released May 4, 1984).

<sup>6</sup> Computer II Final Decision, 77 FCC 2d at 466-70.

information was also made available to competing CPE suppliers on the same terms and conditions.<sup>7</sup> Later, the Commission removed the separate subsidiary requirement.<sup>8</sup> Even after the separate subsidiary requirements were removed, however, the Commission implemented regulations providing for some protection of CPNI in the context of CPE and enhanced services. The BOCs' CPE and enhanced services market personnel are not currently required to gain prior authorization from most customers before accessing CPNI.<sup>9</sup> However, the BOCs must advise customers of their right to protect access to CPNI and must honor a customer's request that CPNI not be disclosed to CPE and enhanced service marketing personnel.<sup>10</sup>

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<sup>7</sup> Second Computer Inquiry, 77 FCC 2d 384.2 FCC Rcd at 152.

<sup>8</sup> CPE Safeguards Order, 2 FCC Rcd at 153.

<sup>9</sup> In the 1991 Computer III remand proceedings, the Commission recognized that the CPNI rules needed to be strengthened. Computer III Remand Proceeding: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991). The Commission therefore required that BOC personnel involved in marketing enhanced services obtain written authorization from customers with more than twenty lines before the BOCs would be permitted access to that customer's CPNI. Id. at 7609.

<sup>10</sup> Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies, 2 FCC Rcd 143, 152-53 ("CPE Safeguards Order"), modified on recon., 3 FCC Rcd 22 (1987), aff'd sub nom., Illinois Bell Telephone Co. v. FCC, 883 F.2d 1094 (1989).

## ARGUMENT

### THE COMMISSION SHOULD INCLUDE IPP PROVIDERS WITHIN THE AMBIT OF THE CPNI RULES AS PROTECTION AGAINST LEC DISCRIMINATION.

Although independent vendors of CPE and enhanced services have some protection against discriminatory CPNI practices, IPP providers have been left completely unprotected. IPP providers do not even have the right to demand that their CPNI be withheld from LECs' payphone marketers. LEC personnel who engage in unregulated payphone marketing are permitted unfettered access to CPNI on their competitors' payphones, while IPP providers are not entitled to the same information regarding LEC payphones.<sup>11</sup>

Access to CPNI provides the LECs important information regarding their customers' use of network services. CPNI enables a payphone provider to target the best locations for payphones - those with the highest calling volumes and the highest proportion of long distance calls. With their privileged access to CPNI, LECs' payphone marketing personnel can target their marketing efforts more efficiently than IPP providers, who lack the same access to CPNI. The failure to extend even minimal protection to CPNI of customers of IPP providers thus gives the LECs an unwarranted competitive advantage in the payphone market.

The Commission's failure to provide even the most minimal CPNI protection to the LECs' competitors is inconsistent with

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<sup>11</sup> APCC believes that rules protecting the payphone market from discriminatory CPNI practices should apply to all LECs. At a minimum, such rules should apply to the BOCs and GTE as is currently the case with respect to CPE and enhanced services.



established Commission policy. Since the Computer II decision, the Commission has focused its efforts on ensuring that in competitive CPE and enhanced service markets, the LECs and their competitors compete under the same terms and conditions, and without cross-subsidies between the monopoly and competitive sectors of the LECs' operations. The Commission has sought to prevent the LECs from using their monopoly position in regulated exchange services to discriminate against other vendors' competitive products and services.

Although the Commission has recognized that discriminatory access to CPNI gives the LECs a significant advantage over their competitors, and has implemented rules protecting LECs' competitors in the provision of enhanced services and CPE, the Commission has not extended the same protection to IPP providers. As a result, even if an IPP provider specifically requests that its CPNI not be disclosed to the LECs' payphone operations, FCC regulations do not prevent the LEC payphone marketers from using CPNI in marketing unregulated services.<sup>12</sup> The LEC payphone marketers are therefore able to use CPNI access to gain an unwarranted advantage over their competitors.

There is no rational basis for failing to extend CPNI protection to IPP providers. The competitive value of CPNI is no less in the case of payphones than for CPE and enhanced services.

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<sup>12</sup> The Commission has consistently recognized the right of enhanced service providers, as "customers" of LECs, to object to LEC use of CPNI regarding the network services they have ordered. IPP providers should have the same right regarding the network services they have ordered.

Indeed, the competition for valuable locations is particularly fierce in the payphone market, and CPNI provides critical data regarding the traffic potential and thus the value of payphone locations served by a competitor.

The Commission has recognized that it is an abuse of the LECs' position as providers of network services to engage in "unhooking," or the targeting of sales pitches at customers for whom network services have been ordered to use with a competitor's unregulated product or service.<sup>13</sup> The Commission's failure to protect IPP providers against LEC use of CPNI, however, is an open invitation to engage in such practices. Targeting competitors' locations when basic services are ordered is no less objectionable when it occurs as a result of privileged access to CPNI than when it takes the form of an immediate marketing attempt by the basic service order-taking personnel. In both cases, the LEC is using its position as a monopoly basic service provider to interfere with its competitors' provision of a competitive product or service.

The LECs' current treatment of CPNI also functions as a cross-subsidy of the LECs' payphone operations. CPNI is a valuable asset. Those with access to it are able to save substantial resources that must be invested in market research by their competitors. The LECs, however, currently provide CPNI to their payphone marketing operations free of charge, while refusing to provide the same information to IPP providers at any price. Thus, in providing discriminatory access to CPNI, the LECs are using

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<sup>13</sup> Computer III Remand Proceedings, 2 FCC Rcd at 7613.

their competitors' network services to subsidize the LECs' own competing payphone operations.

There is no reasonable basis for allowing LEC payphone marketing personnel access to CPNI information without the customer's authorization -- and even against the customer's objections -- while denying similar access to such information by IPP providers. Access to information about a LEC's payphones or those of other competitors would yield important marketing information to IPP providers that would enable IPP providers to more efficiently market their services. Unequal access to this information puts IPP providers at a serious and unwarranted disadvantage and exposes them to competitive injury. Therefore, if such information is available to LECs' payphone marketing personnel, it must be equally available to IPP providers.

Conversely, if information about a LEC's payphones is deemed sensitive enough from a privacy or proprietary standpoint that the information regarding the use of a competitor's must be withheld from IPP providers, then the same considerations would dictate that the information must be withheld from LEC-affiliated payphone marketing personnel.

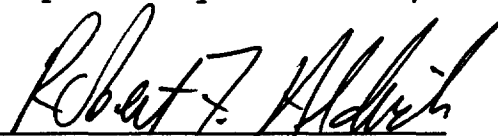
The current policy allowing discriminatory access to payphone CPNI is contrary to the principles of the Communications Act and Computer II and Computer III policies. Therefore, the Commission should either (1) require prior authorization before either the LECs or IPP providers have access to CPNI; or (2) allow equal access to CPNI for both the LECs and IPP providers without prior

authorization. At a minimum, if an IPP provider has affirmatively objected to disclosure of CPNI, a LEC's payphone marketing personnel must not be given access to that CPNI.

#### CONCLUSION

The current rules regarding access to CPNI by the LECs and their competitors in the payphone market grossly discriminate against IPP providers. IPP providers are denied even the minimal protection afforded providers of CPE and enhanced service in terms of access to CPNI. The Commission should equalize access to CPNI by either (1) prohibiting disclosure of CPNI without authorization to either the LECs' payphone marketers or IPP providers; or (2) allowing both the LECs and their competitors access to CPNI. At a minimum, however, the Commission should require the LECs to prohibit their payphone marketing personnel from accessing CPNI of an IPP provider when the IPP provider, who is the customer, has specifically requested that it be withheld.

Respectfully submitted,



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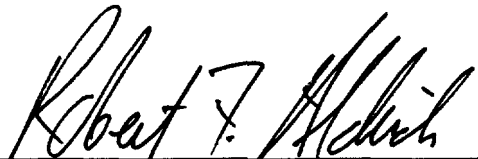
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 11th day of April, 1994, I caused a true copy of the Comments of the American Public Communications Council to be served upon the parties listed below.

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